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**AMERICAN DISCOUNT SECURITY and
DAUD WARDAK aka DAVID WARDAK**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO)

KEVIN WALKER,

Plaintiff,

v.

CITY OF HAYWARD; OFFICER ART
THOMS, OFFICER SCOTT LUNGER,
and OFFICER ZACHARY HOYER,
individually and in their official
capacities; AMERICAN DISCOUNT
SECURITY; and DAUD WARDAK aka
DAVID WARDAK,

Defendants.

CASE NO. C07-06205 TEH
Assigned to Hon. Thelton E. Henderson

**NOTICE OF MOTION AND
MOTION TO DISMISS FIRST
AMENDED COMPLAINT,
PRESENTING DEFENSE OF
FAILURE TO STATE A CLAIM;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF; AND [PROPOSED]
ORDER**

Date : June 9, 2008
Time : 10:00 a.m.
Cttrm : 12

First Amended
Complaint Filed : April 4, 2008
Discovery Cut-off : None
Motion Cut-off : None
Trial Date : None

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants, AMERICAN DISCOUNT
SECURITY; AND DAUD WARDAK aka DAVID WARDAK (collectively as
“Defendants”, “ADS” and “Wardak”, respectively), will and hereby do bring a Motion

to Dismiss First Amended Complaint set for hearing before this Court in **Courtroom “12”, on June 9, 2008 at 10:00 a.m.**, or as soon thereafter as counsel can be heard.

Defendants move the Court to dismiss the following causes of action from Plaintiff’s First Amended Complaint, pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6):

FIRST CAUSE OF ACTION

1. The First Cause of Action fails to state a claim for violation of Plaintiff’s constitutional rights under 42 U.S. C. §1983 by Wardak.

THIRD CAUSE OF ACTION

2. The Third Cause of Action fails to state a claim for violation of Plaintiff’s constitutional rights under 42 U.S. C. §1983 by ADS.

FIFTH CAUSE OF ACTION

3. The Fifth Cause of Action fails to state a claim for negligence per se against Defendants.

SIXTH CAUSE OF ACTION

4. The Sixth Cause of Action fails to state a claim for negligence and negligent infliction of emotional distress against Defendants.

SEVENTH CAUSE OF ACTION

5. The Seventh Cause of Action fails to state a claim for intentional infliction of emotional distress against Defendants.

EIGHTH CAUSE OF ACTION

6. The Eighth Cause of Action fails to state a claim for violation of Civil Code, §51.7 against Defendants.

NINTH CAUSE OF ACTION

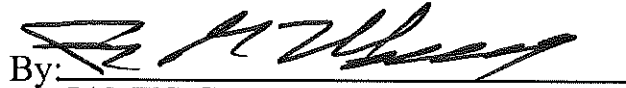
7. The Ninth Cause of Action fails to state a claim for violation of Civil Code §52.1 by Defendants.

///

1 **WHEREFORE**, Defendants pray that this Motion to Dismiss be sustained as to
2 each cause of action mentioned herein, and for other and further relief as this Court may
3 deem just and proper.

4
5 DATED: April 16, 2008

PRINDLE, DECKER & AMARO LLP

6
7 By: 

8 JAMES G. MURRAY
9 Attorneys for Defendants
10 AMERICAN DISCOUNT SECURITY and
11 DAUD WARDAK aka DAVID WARDAK
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LAW OFFICES OF
PRINDLE, DECKER & AMARO LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Plaintiff filed a First Amended Complaint on April 4, 2008 after the court sustained Defendants' Motion to Dismiss certain causes of action in Plaintiff's initial Complaint. As part of his First Amended Complaint, Plaintiff reasserts his 42 U.S.C. §1983 claim against Defendants, as well as his negligence per se, negligent and intentional infliction of emotional distress and Civil Code, Section 52.1 claims. Plaintiff also added a new cause of action, violation of Civil Code, Section 51.7.

However, the allegations contained in Plaintiff's First Amended Complaint still do not support the claims he asserts against Defendants. While the First Amended Complaint provides more detail as to the Hayward Police Department (*see* First Amended Complaint, ¶¶21 and 28), the First Amended Complaint does not cure the deficiencies initially present in Plaintiff's initial Complaint and upon which this court dismissed Plaintiff's causes of action against these moving Defendants. The allegations made against Wardak and ADS are vague and conclusory, asserted solely to avoid another dismissal of the causes of action.

The damages arising out of the First Amended Complaint are based upon the *one time encounter* Plaintiff had with Wardak and Hayward Police Department officers. The facts again alleged in the First Amended Complaint establish that Wardak merely complained about Plaintiff trespassing on the *Jack in the Box* property. Hayward Police Department officers allegedly perpetrated all other conduct.

II.

THE FIRST AND THIRD CAUSES OF ACTION FOR VIOLATION OF 42 U.S.C. §1983 FAIL TO ALLEGE FACTS TO SUPPORT PLAINTIFF'S CLAIMS AGAINST ADS AND WARDAK

A review of Plaintiff's First Amended Complaint reveals that Plaintiff's allegation of federal civil rights violations under 42 U.S.C. 1983 (hereinafter "section 1983") rest

solely on Plaintiff's belief that he was deprived of rights, privileges or immunities entitled to him under the laws of the United States. However, Plaintiff alleges no specific facts which demonstrate that Defendants acted under color of law, which is required to constitute this cause of action.

In order to sustain a cause of action under section 1983, Plaintiff must demonstrate that the Defendant was acting under color of state law. Section 1983 provides in pertinent part that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . 42 U.S.C. Section 1983.

Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance or regulation. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978).

Numerous cases have dealt with the issue of what actions are under color of law for purposes of Section 1983 liability.¹ In *Collins v. Womancare*, the Ninth Circuit addressed this issue. *Collins v. Womancare* (1989) 878 F.2d 1145. In that case, defendant abortion clinic employees effected a citizen's arrest of plaintiffs who were

1

See Rivera v. Green (9th Cir. 1985) 775 F.2d 1381 (finding that merely complaining to the police does not convert a private party into a state actor); *see also Sims v. Jefferson Downs Racing Association* (5th Cir. 1985) 778 F.2d 1068 (holding that execution by a private party of a sworn complaint which forms the basis of an arrest is not enough to convert the private party's acts into state action); *Carey v. Continental Airlines, Inc.* (10th Cir. 1987) 823 F.2d 1402 (reasoning that airport managers complaining about plaintiff presence to a police officer who, acting within the scope of his statutory duties, arrested plaintiff after questioning him, does not, without more, constitute state action for which defendant can be held responsible); *Lee v. Town of Estes Park* (10th Cir. 1987) 820 F.2d 1112 (concluding that the private party effecting the citizen's arrest, transporting the plaintiff to the police station, attempting to persuade the police to file charges, and swearing out a complaint against the arrested party did not constitute joint action).

1 picketing defendant clinic in violation of an injunction. Id. at 1146. The police then
 2 issued misdemeanor citations which were ultimately dismissed. Id. Consequently,
 3 plaintiffs alleged deprivation of their constitutional rights, as well as malicious
 4 prosecution. Id. The Court stated that “[t]o prove a violation of section 1983, [plaintiffs]
 5 must demonstrate that [defendant] (1) deprived them of a right secured by the
 6 Constitution, and (2) acted under color of state law.” Id. at 1147.

7 Although the defendant itself had actually effectuated the arrest of the plaintiffs,
 8 the Court still found that the citizen’s arrest did not constitute action under color of state
 9 law sufficient to support the section 1983 cause of action. Id. at 1150. In fact, the Court
 10 cited all five of the previous federal decisions on point, noting that all five which had
 11 considered whether a citizen’s arrest can form the basis of liability under section 1983
 12 had resolved this issue by concluding that it did not constitute action under color of state
 13 law. Id. In its explanation, the Court reasoned that “for conduct of *private parties* to be
 14 under color of state law, it must be fairly attributable to the State.” Id. at 1151 (citation
 15 omitted). In further analysis, the Collins Court discussed a joint action inquiry which
 16 focuses on “whether the state has ‘so far insinuated itself into a position of
 17 interdependence with [the private entity] that it must be recognized as a joint participant
 18 in the challenged activity’. . . Joint action therefore requires substantial degree of
 19 cooperative action.” Id. at 1154 (citation omitted).

20 In the case at bar, all that is alleged against Defendants is that Wardak summoned
 21 the police and provided a written statement that he was making a citizen’s arrest of
 22 Plaintiff. Wardak’s actions constituted nothing more than the citizen’s arrests at issue
 23 in Collins, *supra*, and therefore cannot qualify as actions under “color of state law”.

24 Although Plaintiff makes the conclusory allegation that Wardak and the officers
 25 “conspired” together in falsely accusing Plaintiff of trespassing and engaging in criminal
 26 conduct (First Amended Complaint, ¶27), the specific facts asserted in the First
 27 Amended Complaint contradict this conclusory allegation. Specifically, the First
 28 Amended Complaint contends that Wardak summoned the police on his own, and

1 informed the officers that he wanted to arrest Plaintiff for trespassing. (First Amended
 2 Complaint, ¶22). The First Amended Complaint *never* alleges that Wardak told the
 3 police officers how to effectuate the arrest, or that Wardak told the police officers to
 4 allegedly beat and assault Plaintiff without provocation. Moreover, the First Amended
 5 Complaint is clear that the *police officers* were the ones who allegedly falsely reported
 6 that Plaintiff resisted arrest and attacked the police officers. (First Amended Complaint,
 7 ¶26) Although the First Amended Complaint alleges that the officers named Wardak as
 8 a “witness”, the First Amended Complaint *never* states that Wardak personally
 9 corroborated the police officers’ allegedly false report. According to the First Amended
 10 Complaint, *Wardak’s* written report pertained solely to Wardak summoning the police
 11 for a trespassing issue. (First Amended Complaint, ¶27) Whatever may or may not have
 12 transpired between Plaintiff and the Hayward Police Department officers was a *separate*
 13 incident of which Wardak and ADS had no part. As such, 42 U.S.C. §1983 does not
 14 apply to ADS and Wardak.

15 III.

16 THE FIFTH CAUSE OF ACTION FOR NEGLIGENCE PER SE 17 FAILS TO ALLEGE FACTS TO SUPPORT PLAINTIFF’S CLAIM AGAINST 18 ADS AND WARDAK

19 In order for a claim of negligence *per se* to succeed, the plaintiff must meet
 20 all four of the following requirements:

- 21 1. The defendant violated a regulation of a public entity;
- 22 2. The violation proximately caused the injury to the person;
- 23 3. The injury resulted from an occurrence of the nature which the regulation
- 24 was designed to prevent; and
- 25 4. The person suffering the injury to his person was one of the class of
- 26 person whose protection the ordinance was adopted.

27 See Capolungo v. Bondi (1986) 179 Cal.App.3d 346, 349-350; *see also* California
 28 Evidence Code, Section 669.

Plaintiff has amended his negligence per se cause of action, by basing said cause of action on an alleged violation of Civil Code, Section 43. (First Amended Complaint, ¶¶56-58)

Civil Code, Section 43 provides:

Besides the personal rights mentioned or recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

Here, Plaintiff's "injuries" arise from the alleged unprovoked beating and assault he sustained. (First Amended Complaint, ¶¶ 24-25) Plaintiff was allegedly assaulted and battered by the Hayward Police Department officers, **not** Wardak or any other employees of ADS. Moreover, Plaintiff was booked, charged and prosecuted for resisting a peace officer, public intoxication and carrying a dirk or dagger; these charges were not initiated by Wardak or ADS.

Accordingly, Plaintiff has failed to plead any facts which would support any violation of Civil Code, Section 43 by Wardak or ADS, nor establish that any violation by Wardak/ADS caused his injuries.

IV.

THE SIXTH CAUSE OF ACTION FOR NEGLIGENCE AND NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS FAILS TO ALLEGE FACTS TO SUPPORT PLAINTIFF'S CLAIM AGAINST ADS AND WARDAK

The elements of a cause of action for Negligence are: duty; breach of duty; legal cause; and damages. *See Paz v. State of California* (2000) 22 Cal.4th 550, 559. The existence of a duty is the threshold element of a negligence cause of action. *Id.*

Plaintiff contends that Defendants owed Plaintiff a duty to:

1. Act with reasonable care to prevent injury to Plaintiff;
2. Not arrest him without lawful justification;

3. Not direct law enforcement personnel to seize him without lawful justification; and

4. Properly train and supervise its personnel.

(First Amended Complaint, ¶60)

A review of Plaintiff's First Amended Complaint reveals that Plaintiff's "injury" stems from Hayward Police Department officers beating and assaulting him for no apparent reason. (First Amended Complaint, ¶¶24-25) Wardak and ADS were not involved in the alleged unprovoked assault of Plaintiff. Secondly, Hayward Police Department officers ultimately arrested and seized Plaintiff for resisting a peace officer, public intoxication and carrying a dirk and dagger; Wardak and ADS were **not** involved with any of these charges. Accordingly, Plaintiff has not alleged any breach of a duty on the part of Wardak and ADS, which caused his ultimate damages.

V.

THE SEVENTH CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FAILS TO ALLEGE FACTS TO SUPPORT PLAINTIFF'S CLAIM AGAINST ADS AND WARDAK

"[T]o state a cause of action for intentional infliction of emotional distress a plaintiff must show: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." Trerice v. Blue Cross of America (1989) 209 Cal.App.3d 878, 883. "Conduct, to be 'outrageous' must be so extreme as to exceed all bounds of that usually tolerated in a civilized society." Id.

Here, the First Amended Complaint acknowledges that Wardak informed Plaintiff and his friend that the *Jack in the Box* restaurant was closed for business and that Plaintiff and his friend still remained on the premises. (See First Amended Complaint ¶19.) Summoning the police about someone who is trespassing does not constitute

1 “outrageous conduct”, exceeding all bounds usually tolerated in a civilized society.
 2 Regardless of what the city of Hayward police officers may or may not have done
 3 thereafter, conduct by the *police officers* is **irrelevant** for purposes of a cause of action
 4 against ADS and Wardak.

5 VI.

6 **THE EIGHTH CAUSE OF ACTION FOR VIOLATION OF CIVIL CODE** 7 **§51.7 FAILS TO ALLEGE FACTS TO SUPPORT PLAINTIFF’S CLAIM** 8 **AGAINST ADS AND WARDAK**

9 Civil Code §51.7 provides in pertinent part:

10 (a) All persons within the jurisdiction of this state have the
 11 right to be free from any violence, or intimidation by threat
 12 of violence, committed against their persons or property
 13 because of political affiliation, or on account of any
 14 characteristic listed or defined in subdivision (b) or (e) of
 15 Section 51 . . .

16 Here, the First Amended Complaint only alleges violence perpetrated by Hayward
 17 Police Department officers. The First Amended Complaint does not contain any
 18 allegations that Wardak or ADS used violence or threats of violence against Plaintiff.
 19 Accordingly, Plaintiff’s Eighth Cause of Action must fail.

20 VII.

21 **THE NINTH CAUSE OF ACTION FOR VIOLATION OF CIVIL CODE §52.1** 22 **FAILS TO ALLEGE FACTS TO SUPPORT PLAINTIFF’S CLAIM AGAINST** 23 **ADS AND WARDAK**

24 Civil Code §52.1 provides remedies for the interference, “*by threats, intimidation*
 25 *or coercion*”, with the exercise of constitutional or other rights provided by law. The
 26 legislature enacted Civil Code §52.1 in response to the increase in hate crimes and to
 27 provide protection from discriminatory violence and intimidation, and from threats,
 28 intimidation and coercion that denied the civil rights of others. See Stamps v. Superior
Court (2006) 136 Cal.App.4th 1441, 1447-1448.

1 In this case, Plaintiff's only interaction with ADS and/or Wardak was when
2 Wardak advised Plaintiff and his friend that the *Jack in the Box* restaurant was closed.
3 Again, the First Amended Complaint does **not** allege that ADS or Wardak ever used any
4 threats of violence, intimidation or coercion against Plaintiff. As such, Plaintiff's Ninth
5 Cause of Action must also fail.

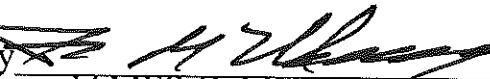
6 **VIII.**

7 **CONCLUSION**

8 As set forth above, Plaintiff has failed to set forth a claim to sustain his First,
9 Third, Fifth, Sixth, Seventh, Eighth and Ninth Causes of Action against ADS and
10 Wardak. Accordingly, Defendants respectfully request that the Court dismiss said causes
11 of action without leave to amend.

12
13 DATED: April 16, 2008

14 PRINDLE, DECKER & AMARO LLP

15 By 
16 JAMES G. MURRAY
17 Attorneys for Defendants, AMERICAN
18 DISCOUNT SECURITY; AND DAUD
19 WARDAK aka DAVID WARDAK
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO)

KEVIN WALKER,
Plaintiff,

v.

CITY OF HAYWARD; OFFICER ART
THOMS, OFFICER SCOTT LUNGER,
and OFFICER ZACHARY HOYER,
individually and in their official
capacities; AMERICAN DISCOUNT
SECURITY; and DAUD WARDAK aka
DAVID WARDAK,
Defendants.

CASE NO. C07-06205 TEH
Assigned to Hon. Thelton E. Henderson

[PROPOSED] ORDER RE MOTION
TO DISMISS

Date : June 9, 2008
Time : 10:00 a.m.
Ctmm : 12

First Amended
Complaint Filed : April 4, 2008
Discovery Cut-off : None
Motion Cut-off : None
Trial Date : None

The Motion to Dismiss brought by Defendants, AMERICAN DISCOUNT SECURITY and DAUD WARDAK aka DAVID WARDAK, came on regularly for hearing on June 9, 2008.

After reading the moving and opposing papers, and hearing oral argument, the Court hereby SUSTAINS Defendants' Motion to Dismiss.

IT IS HEREBY ORDERED that the following causes of action shall be dismissed from Plaintiff's First Amended Complaint as to AMERICAN DISCOUNT SECURITY and DAUD WARDAK aka DAVID WARDAK without leave to amend:

1. The First Cause of Action for violation of Plaintiff's constitutional rights under 42 U.S. C. §1983;
2. The Third Cause of Action for violation of Plaintiff's constitutional rights under 42 U.S. C. §1983;
3. The Fifth Cause of Action for negligence per se;
4. The Sixth Cause of Action for negligence and negligent infliction of emotional distress ;
5. The Seventh Cause of Action for intentional infliction of emotional distress;
6. The Eighth Cause of Action for violation of Civil Code §51.7; and
7. The Ninth Cause of Action for violation of Civil Code §52.1.

DATED:

HON. THELTON E. HENDERSON

PROOF OF SERVICE

Kevin Walker v. City of Hayward, et al.
Case No. C07-06205 TEH

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and am not a party to the within action; my business address is 310 Golden Shore, 4th Floor, Long Beach, California 90802.

On April 17, 2008, I caused the foregoing document to be served, described as **NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT, PRESENTING DEFENSE OF FAILURE TO STATE A CLAIM; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; AND [PROPOSED] ORDER** on all interested parties to this action, through the use of the website maintained by USDC for electronic service:

SEE ATTACHED SERVICE LIST

☒ **BY E-FILING:** By submitting an electronic version of the document. This case has been ordered for Electronic Case Filing.

☐ **BY OVERNIGHT COURIER:** I caused the above-referenced document(s) to be delivered to _____ for delivery to the above address(es).

☐ **BY FAX:** I caused the above-referenced document to be transmitted via facsimile from Fax No. _____ to Fax Numbers listed on service list _____. The facsimile machine I used complies with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(1), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration.

☐ **BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the addressee(s).

☐ [State] I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ [Federal] I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 17, 2008, at Long Beach, California.



ALICE RUSA

Kevin Walker v. City of Hayward, et al.
Case No. C07-06205 TEH

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